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MEMORANDUM

TO: Committee on Legal Services

FROM: Megan Waples, Office of Legislative Legal Services

DATE: December 5, 2018

SUBJECT: Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning building, fire, and life safety code enforcement and certification of inspectors for health facilities licensed by the state of Colorado, 8 CCR 1507-31 (LLS Docket No. 180085; SOS Tracking No. 2017-00621).¹

Summary of Problems Identified and Recommendations

Section 24-4-103 (12.5)(a)(IV), C.R.S., requires that when a rule incorporates another document, standard, or code by reference, the rule must state where copies of the document are available "from the agency...or organization or association originally issuing the code, standard, guideline, or rule." Rule 3 of the rules of the Director of the Division of Fire Prevention and Control's Rules (Division) incorporates various codes and standards by reference, but does not provide information about where a person can get copies from the agencies or organizations originally issuing those codes and standards. Other rules rely on those improperly incorporated codes and also do not include that information. **Because the rules conflict with the statute, we recommend that Rules 3.1, 3.2, 3.3, 3.4, 3.7, 3.8, 3.9, 4.2, 5.3, 5.4, 6.2.1, 6.2.3, 6.5, 6.5.3 (C),**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

7.2.1, 8.4, 9.1.1, 9.2.1, 9.2.2, 10.1.3 (A), 10.1.3 (B), 10.2.3 (B), and 12.1.3 of the rules of the Director of the Division of Fire Prevention and Control concerning building, fire, and life safety code enforcement and certification of inspectors for health facilities licensed by the state of Colorado not be extended.

Section 24-33.5-1202 (2.5), C.R.S., defines the term "certified fire inspector" as a person who is certified to conduct fire safety plan reviews and inspections. Rule 10.2.1 of the Division's rules, however, requires that fire inspectors performing plan reviews "must be 'Qualified Fire Inspectors' as defined in section 24-33.5-1202 (2.5), C.R.S."

Because the rule's defined term is not consistent with the term defined in statute, we recommend that Rule 10.2.1 of the rules of the Director of the Division of Fire Prevention and Control concerning building, fire, and life safety code enforcement and certification of inspectors for health facilities licensed by the state of Colorado not be extended.

Analysis

- 1. Rule 3 of the Division's rule does not meet statutory requirements for incorporating material by reference because it fails to state where copies of the incorporated material are available from the issuing organization or agency.**

Section 24-33.5-1203.5, C.R.S., requires the Director of the Division to promulgate rules implementing part 12 of article 33.5 of title 24. Specifically, that section requires the agency to adopt codes and standards:

24-33.5-1203.5. Powers and duties of director – report. (2) In order to carry out the purposes and provisions of this part 12 and part 14 of article 20 of title 30, the director of the division shall promulgate rules in accordance with article 4 of this title 24:

(a) Adopting codes, which shall be identical to or modeled on the international codes published by the international code council; and

(b) Adopting nationally recognized standards that the director reasonably finds necessary to carry out the purposes and provisions of this part 12, sections 24-33.5-2008 and 44-30-515, and part 14 of article 20 of title 30.

The requirements for incorporating material by reference in an agency rule are established in section 24-4-103 (12.5), C.R.S., which requires that the rule must include certain information about the incorporated material. Specifically, section 24-4-103 (12.5)(a)(IV), C.R.S., states:

24-4-103. Rule-making - procedure - definitions - statutory citation correction. (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:

(IV) The rule states where copies of the code, standard, guideline, or rule are available for a reasonable charge from the agency adopting the rule and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing the code, standard, guideline, or rule; ...

Rules 3.1, 3.2, 3.3, 3.4, 3.8, and 3.9 of the Division's rule (attached as **Addendum A**) incorporate multiple codes and standards by reference. Rule 3.7 states:

ARTICLE 3 – CODES, DOCUMENTS, AND STANDARDS INCORPORATED BY REFERENCE

3.7 The Division shall maintain copies of the complete texts of the adopted codes for public inspection. Interested parties may inspect the referenced incorporated materials during regular business hours at the Division office located at 690 Kipling Street, Lakewood, Colorado, 80215.

While this section states where a person can get a copy of the codes from the Division, the rule includes no information about where copies are available from the agencies or organizations originally issuing the codes. Therefore, Rules 3.1, 3.2, 3.3, 3.4, 3.7, 3.8, and 3.9 do not comply with statutory incorporation by reference requirements.

Rules 4.2, 5.3, 5.4, 6.2.1, 6.2.3, 6.5, 6.5.3 (C), 7.2.1, 8.4, 9.1.1, 9.2.1, 9.2.2, 10.1.3 (A), 10.1.3 (B), 10.2.3 (B), and 12.1.3 (attached as **Addendum B**) explicitly reference or rely on the incorporated codes. These rules also do not state where copies are available from the agencies or organizations originally issuing them. Because the codes are not properly incorporated by reference, these rules are also inconsistent with statute.

2. The defined terms in Rule 10.2.1 of the Division's rule are inconsistent with the terms defined in statute.

Section 24-33.5-1202 (2.5), C.R.S., defines the term "certified fire inspector":

24-33.5-1202. Definitions. (2.5) "Certified fire inspector" means a person with fire safety plan review or inspection responsibilities who is employed by or volunteers services to the state or a governing body as a fire inspector and who is certified by the division to conduct fire safety plan reviews and inspections pursuant to section 24-33.5-1211.

Rule 10.2.1 incorrectly references the defined term as "qualified fire inspectors":

ARTICLE 10 – BUILDING CODE AND FIRE CODE INSPECTOR QUALIFICATION

10.2.1 Fire Inspectors performing construction plan review and inspections must be “Qualified Fire Inspectors” as defined in section 24-33.5-1202 (2.5), C.R.S.

The rule is inconsistent with statute because the reference to the defined term is incorrect.

3. The Director's rule-making authority does not authorize the Director to depart from the requirements for incorporation by reference or to modify statutory terms.

Section 24-33.5-1203.5, C.R.S., authorizes the Director to promulgate rules and adopt codes by reference to implement the provisions of part 12 of article 33.5 of title 24, C.R.S.:

24-33.5-1203.5. Powers and duties of director – report. (1) In addition to any other duties prescribed by law, the director of the division shall perform the following duties:

....

(b) Adopt such rules as the director of the division deems necessary to carry out the purposes and provisions of this part 12 and amend such rules from time to time as necessary. Such rules and amendments shall be adopted in accordance with article 4 of this title.

(2) In order to carry out the purposes and provisions of this part 12 and part 14 of article 20 of title 30, the director of the division shall promulgate rules in accordance with article 4 of this title 24:

(a) Adopting codes, which shall be identical to or modeled on the international codes published by the international code council; and

(b) Adopting nationally recognized standards that the director reasonably finds necessary to carry out the purposes and provisions of this part 12, sections 24-33.5-2008 and 44-30-515, and part 14 of article 20 of title 30.

The statute requires that the Director adopt codes in compliance with article 4 of title 24, C.R.S., and does not provide an exception to the incorporation by reference requirements. Nor does it authorize changing statutorily defined terms.

Recommendation

We therefore recommend that Rules 3.1, 3.2, 3.3, 3.4, 3.7, 3.8, 3.9, 4.2, 5.3, 5.4, 6.2.1, 6.2.3, 6.5, 6.5.3 (C), 7.2.1, 8.4, 9.1.1, 9.2.1, 9.2.2, 10.1.3 (A), 10.1.3 (B), 10.2.1, 10.2.3

(B), and 12.1.3 of the rules of the Director of the Division of Fire Prevention and Control concerning building, fire, and life safety code enforcement and certification of inspectors for health facilities licensed by the state of Colorado not be extended because they conflict with statute.

ADDENDUM A

- 3.1 The technical requirements of these rules are supported primarily by codes developed by the International Code Council and the National Fire Protection Association. These two organizations are membership associations dedicated to building safety and fire prevention. These rules establish minimum requirements where the Division is the Authority Having Jurisdiction for building systems using prescriptive and performance related provisions, which are widely used to construct residential and commercial buildings. The appropriate portions of the adopted codes (particularly in relation to classification of occupancy) will be applied as prescribed by the adopted codes themselves. Where there are differing provisions for new and existing construction, all work taking place after July 1, 2013 must meet the requirements for new construction.
- 3.2 The following codes and their referenced standards are adopted and promulgated as minimum standards for the construction and maintenance of all property, buildings, and structures containing a Health Facility in the State of Colorado where the Division is the Authority Having Jurisdiction:
- 3.2.1 The following Building Codes are adopted by these regulations. Wherever these regulations refer to a Building Code, the following codes and standards will be enforced by the Division where applicable:
- a) International Building Code - 2015 Edition, First Printing: May 2014 (Copyright 2011 by International Code Council, Inc. Washington D.C.).
 - b) International Mechanical Code - 2015 Edition, First Printing: May 2014 (Copyright 2011 by International Code Council, Inc. Washington D.C.).
 - c) International Energy Conservation Code - 2015 Edition, First Printing: May 2014 (Copyright 2011 by International Code Council, Inc. Washington D.C.).
 - d) International Existing Building Code- 2015 Edition, First Printing: May 2014 (Copyright 2011 by International Code Council, Inc. Washington D.C.).
 - e) International Residential Code – 2015 Edition, First Printing: May 2014 (Copyright 2011 by International Code Council, Inc. Washington D.C.).

- f) All electrical work shall be conducted, inspected, and approved in accordance with the provisions of the State of Colorado's Electrical Board's rules and regulations.
 - g) All plumbing work shall be conducted, inspected, and approved in accordance with the provisions of the State of Colorado's Examining Board of Plumber's rules and regulations.
- 3.2.2 The following Fire Codes are adopted by these regulations. Wherever these regulations refer to a Fire Code, the following codes and standards will be enforced where applicable:
- a) International Fire Code - 2012 Edition, First Printing: May 2015 (Copyright 2014 by International Code Council, Inc. Washington D.C.), including Appendices B through I.
 - b) International Wildland-Urban Interface Code – 2015 Edition, First Printing: May 2014 (Copyright 2011 by International Code Council, Inc. Washington D.C.).
- 3.2.3 The following Life Safety and Health Facility Construction Codes and Guidelines are adopted by these regulations. Wherever these regulations refer to a Life Safety Code, the following codes, standards, and guidelines will be enforced where applicable:
- a) NFPA 101A Guide on Alternative Approaches to Life Safety – 2013 Edition, First Printing: June 2013 (Copyright 2013 by National Fire Protection Association).
 - b) NFPA 101 Life Safety Code – 2012 Edition, First Printing: September 2011 (Copyright 2011 by National Fire Protection Association).
 - c) NFPA 99 Health Care Facilities Code – 2012 Edition, Fourth Printing: April 2013 (Copyright 2011 by National Fire Protection Association).
 - d) Facilities Guidelines Institute, Inc. (FGI) - 2010 Guidelines for Design and Construction of Health Care Facilities including errata and addendums adopted by the FGI as of July 1st, 2013 (Copyright 2010 by Facilities Guidelines Institute, Inc. - Chicago, Illinois). The FGI applies to all facilities submitting applications for Fire and/or Life Safety Construction Permits to the Division after January 1, 2014.

- 3.3 The Fire Safety Evaluation System (FSES) as prescribed by NFPA 101A, Guide on Alternative Approaches to Life Safety, may be used as a means for establishing equivalent protection to specific provisions of the NFPA 101, the Life Safety Code for new or existing Health Facilities, or renovations of existing Health Facilities.
- 3.4 In any facility where the evacuation capability of the facility or resident population is required to be rated, the "Procedure for Determining Evacuation Capability" published by NFPA is to be used by the facility whether the facility is evaluated utilizing the NFPA 101A, Guide on Alternative Approaches to Life Safety (2013), or NFPA Standard 101, Life Safety Code (2012). The Level of Evacuation Difficulty for each facility will be determined by the scores developed in the Worksheet for Rating Residents completed by responsible staff for each resident and the level of staffing maintained at the facility. It is the responsibility of the owner or administrator to ensure that the abilities of the residents are accurately rated in accordance with the published instructions. Each new resident shall be rated utilizing the Worksheet for Rating Residents within two (2) weeks of their admission to the facility. All resident rating scores shall be reviewed at least annually, or when there are significant changes in a resident's physical or cognitive abilities. Failure to rate the evacuation capability in accordance with these provisions upon two inspections will result in a permanent "impractical" rating for the facility.
- 3.7 The Division shall maintain copies of the complete texts of the adopted codes for public inspection. Interested parties may inspect the referenced incorporated materials during regular business hours at the Division office located at 690 Kipling Street, Lakewood, Colorado, 80215.
- 3.8 In the event that a new edition of the code is adopted by the Division, the code in effect at the time of permit application will remain in effect throughout the work authorized by the permit.
- 3.9 This rule does not include later amendments or editions of the incorporated material.

ADDENDUM B

- 4.2 Where the Health Facility is located in a jurisdiction with no local Building Department, the authority to conduct the necessary plan reviews, issue building permits, conduct inspections, issue Certificates of Occupancy, issue Temporary Certificates of Occupancy, and take enforcement action to ensure that a building or structure has been constructed in conformity with these rules is the responsibility of the Division. Under these circumstances, the Division will issue the applicable Building Permits and associated Certificates of Occupancy as demonstration of compliance with the Division's adopted building codes. The determination of when a building permit is required shall be based upon the International Building Code Section 105 requirements (except 105.1.1 and 105.1.2). Substantial changes to the scope of the project (including addition of square footage to the project scope) will require a submittal of a new application for a permit.
- 5.3 If the local fire department declines to perform the plan review or any subsequent inspection, or if a Qualified Fire Inspector is not available, the Division will be considered the Fire and Life Safety Code Official and the Division will perform the construction plan reviews and inspections required by the Division's adopted Fire and Life Safety Codes and will enforce the Division's adopted Fire and Life Safety Codes. The determination of when a fire and life safety permit is required will be based upon the International Building Code Section 105 requirements (except 105.1.1 and 105.1.2) and the International Fire Code Section 105.7 requirements. Substantial changes to the scope of the project (including addition of square footage to the project scope) will require a submittal of a new application for permit.
- 5.4 For Certified Health Facilities located in a jurisdiction where the local fire department has Qualified Fire Inspectors at the appropriate level for the task, the local fire department is responsible for conducting the necessary fire code construction plan reviews and inspections. Under these circumstances, the local fire department will be considered the Fire Code Official. In this instance, the Division will be considered the Life Safety Code Official and the Division will perform the construction plan reviews and inspections required by the Division's adopted Life Safety Codes and will enforce the Division's adopted Life Safety Codes. The determination of when a life safety permit is required shall be based upon the International Building Code Section 105 requirements (except 105.1.1 and 105.1.2) and the International Fire Code Section 105.7 requirements. Substantial changes to the scope of the project (including addition of square footage to the project scope) will require a submittal of a new application for a permit.

- 6.2.1 For all construction (including adding previously unlicensed space to a Health Facility license) or operational permits not covered under a Limited Scope Project permit as defined by this Article, the Business Entity shall submit a complete plan review application package to the Division for Life Safety Code compliance review. If there is not a local building department, the Business Entity shall also submit a complete plan review application package to the Division for Building Code compliance review.
- 6.2.3 The building permit application package shall be concurrently submitted to the Division and to the local fire department. Either the Qualified Fire Department or the Division will review the submittal for compliance with the applicable codes. Permit issuance is contingent upon the review and approval of the submittal by the Fire Code Official. The Business Entity is required to contact the local fire department to determine the required submittal items not listed in this rule.
- 6.5 Deferred Design/Build Submittals/Shop Drawings
- 6.5.1 Deferred design/build (shop drawing) submittals for fire protection and life safety systems are permitted; however, construction documents must provide sufficient information to show compliance with Fire and Life Safety Code requirements and coordination between fire systems and other building systems (i.e., HVAC systems, security systems).
- 6.5.2 Shop (Installation) drawings for fire protection and life safety systems shall be submitted to the Fire and Life Safety Code Official(s) for review and approval prior to beginning installation of the system.
- A) Fire sprinkler and fire alarm shop drawings shall be submitted to the Fire and Life Safety Code Officials in accordance with the requirements of the adopted codes in the format as prescribed by the Division and the local fire department.
- B) Shop (installation) drawings for other systems regulated by the Fire and Life Safety Codes shall be submitted to the Division in accordance the appropriate referenced standard for the system.
- 6.5.3 Minimum Qualifications for Fire Protection and Life Safety System Design and Installation
- C) Other Fire and Life Safety Protection Systems Regulated by the Building, Fire, or Life Safety Codes

The design and installation shall be performed by a company or individual with manufacturer- or factory-approved training for the specific system, or as otherwise required by the applicable code section or referenced standard.

- 7.2.1 Project sites shall be inspected by the Fire and Life Safety Code Officials to verify compliance with the Fire and Life Safety Codes and approved construction documents. Construction inspections shall be conducted by a person qualified as Fire Inspector II or Fire Inspector III – Plans Examiner. Third-party inspection provisions do not apply to the required Fire and Life Safety Code inspections. Either the Division or the Qualified Fire Department shall perform fire inspections.
- 8.4 Certificates of Occupancy and Certificates of Compliance will be issued based on the codes in effect during the most recent inspection of the facility. No Certificate of Compliance will be issued until compliance with the applicable codes and standards has been demonstrated through record review of local Authority Having Jurisdiction documents of inspection and certification, Division inspection and certification, or other appropriate documentation, showing the building to be in conformance with applicable codes and standards applicable at the time of issuance. The Business Entity is required to submit these documents to the local Authority Having Jurisdiction.
- 9.1.1 The Division may perform inspections of the buildings and structures when deemed necessary to ensure that they are maintained in accordance with the appropriate chapters of the adopted Fire and Life Safety Codes. If the Health Facility is not certified or seeking certification to participate in Medicare or Medicaid funding, the Local Qualified Fire Department providing fire protection service will conduct these maintenance inspections.
- 9.2.1 The Business Entity shall ensure that building systems are inspected, tested, and maintained as required by the adopted codes and referenced standards.
- 9.2.2 Personnel employed by a Business Entity performing inspection, testing, and maintenance programs are not required to be Qualified Fire Inspectors, but must be qualified to perform the actions as required by the standards or listings of the devices or systems. Exception: Work conducted on system components that would require permits, licensing, or certifications under any adopted codes, laws, or rules shall be conducted in accordance with those requirements.
- 10.1.3 Duties of Third-Party Inspectors
 - A) Third-Party Inspectors contracted by the Business Entity shall conduct the required inspections and require corrections or modifications as necessary to

ensure that a building or structure is constructed in conformity with the Building Code adopted by the Division.

- B) Third-Party Inspectors contracted by the Business Entity shall enforce only the codes adopted by the Division.

10.2.3 Duties of Qualified Fire Inspectors

- B) Where there is not a Qualified Fire Department, Division Fire Inspectors shall conduct the required plan reviews and inspections and require corrections or modifications as necessary to ensure that a building or structure is constructed in conformity with the Division's adopted Fire and Life Safety Codes.

- 12.1.3 An application for appeal must be based on a claim that the true intent of this code or the standards legally adopted therein have been incorrectly interpreted, the provisions of this code do not fully apply, or an equally good or better form of construction is proposed. The Board of Appeals may not waive any requirements of the codes or standards; however the Board of Appeals may recommend alternative materials or methods as provided in the codes or standards. The final written decision of the Board of Appeals is final agency action for purposes of section 24-4-106, C.R.S.